

## **REMARKS**

The Final Office Action of October 9, 2009 and the Advisory Action of December 15, 2009 have been considered by the Applicant. No claims are amended or cancelled. New claims 52-59 are added. Claims 43-48, 50, and 52-59 are pending. Reconsideration of the Application is requested.

Claims 43-48 and 50 were rejected under 35 U.S.C. § 103(a) as allegedly being obvious over Arsem (U.S. Patent No. 2,472,361) and Marks (U.S. Patent No. 2,817,621) in view of Katzen (U.S. Patent No. 4,369,199). Applicant traverses the rejection.

Applicant will first address the claims previously presented for examination. In the Advisory Action of December 15, 2009, the Examiner did not address Applicant's argument regarding preamble reliance. Applicant relied on the "controlling Darkling beetles" limitation in the preamble to overcome an enablement rejection under 35 U.S.C. § 112, first paragraph and an anticipation rejection under 35 U.S.C. § 102(e). See the Preliminary Amendment filed by Applicant on July 3, 2007 and the Amendment filed by Applicant on July 6, 2009. "[C]lear reliance on the preamble during prosecution to distinguish the claimed invention from the prior art transforms the preamble into a claim limitation because such reliance indicates use of the preamble to define, in part, the claimed invention." MPEP § 2111.02(II), *Catalina Mktg. Int'l v. Coolsavings.com, Inc.*, 289 F.3d at 808-809, 62 USPQ2d at 1785. Applicant has relied on the "controlling Darkling beetles" limitation in the preamble thus indicating that the limitation is used to define the invention. Consequently, the limitation in the preamble must be given patentable weight.

The Examiner stated that the presence of Darkling beetles is not required as another argument against giving the preamble of claim 43 patentable weight. To expedite prosecution, Applicant has added new claims 52-59. Claim 52 contains all of the limitations of claim 43 and the additional limitation that Darkling beetles are present in the animal habitat prior to the treatment step. Implicit support for claim 52 can be found in page 9, line 20 – page 10, line 2 of the specification. This section refers to controlling the growth of Darkling beetles, which indicates that they can be present in the animal habitat prior to treatment.

In claim 53, treatment with TCM occurs prior to the placement of animals in the habitat. Original claim 2 supports new claim 53.

In claim 54, treatment with TCM occurs after placement of animals in the habitat. Original claim 3 supports new claim 54.

In claim 55, treatment with TCM occurs both prior to and after placement of animals in the habitat. Original claim 4 supports new claim 55.

In claim 56, the habitat is dusted with powdered TCM. Original claim 17 supports new claim 56.

In claim 57, the habitat is soaked with an aqueous TCM solution. Original claim 5 supports new claim 57.

In claim 58, the concentration of TCM is from about 25 to about 1,000 ppm. Page 6, lines 12-14 of the specification support new claim 58.

In claim 59, the concentration of TCM is from about 50 to about 500 ppm. Page 6, line 14 of the specification supports new claim 59.

Applicant requests withdrawal of the § 103(a) rejection.

### CONCLUSION

For the reasons detailed above, it is respectfully submitted all claims remaining in the application (Claims 43-48, 50, and 52-59) are now in condition for allowance.

Respectfully submitted,

Fay Sharpe LLP

1/08/10  
Date

Richard M. Klein  
Richard M. Klein, Reg. No. 33,000  
The Halle Building, 5th Floor  
1228 Euclid Avenue  
Cleveland, Ohio 44115-1843  
216.363.9000

CERTIFICATE OF MAILING OR TRANSMISSION	
I hereby certify that this correspondence (and any item referred to herein as being attached or enclosed) is (are) being	
<input type="checkbox"/> deposited with the United States Postal Service as First Class Mail, addressed to: Mail Stop Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date indicated below.	
<input checked="" type="checkbox"/> transmitted to the USPTO by electronic transmission via EFS-Web on the date indicated below.	
Express Mail Label No.:	Signature: <u>Laurie A. Boylan</u>
Date: <u>January 8, 2010</u>	Name: <u>LAURIE A. BOYLAN</u>